90-1234

Supreme Court, U.S.
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CLERK

NO. 90-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ANTONIO DIAZ,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Was Petitioner indicted, convicted and sentenced pursuant to an ex post facto law if that law did not become effective until 52 days after Petitioner committed the allegedly illegal acts.

2. Were Petitioner's Fifth Amendment and Eighth Amendment rights violated by being punished pursuant to a statute not in effect at the time Petitioner committed the acts for which he was convicted.

3. Were Petitioner's Fifth Amendment and Eighth Amendment rights violated by being punished in excess of the penalties authorized by Congress.

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NO. 90-_____

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ANTONIO DIAZ,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Antonio Diaz, files this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and asks this Court to reverse the judgment or, alternatively, to remand the case to the District Court for further proceedings.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not reported. A copy of the opinion is reproduced in Appendix A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on October 18, 1990. No motion for rehearing or extension of time was filed. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition involves Article 1, § 10[1], the Fifth Amendment and the Eighth Amendment of the United States Constitution. This Petition also involves 21 U.S.C. § 841(a)(1) (1982), 21 U.S.C. § 841(b) (Supp. V 1987), and 21 U.S.C.A. § 841(b) (West Supp. 1990). Copies of the statutes are reproduced in Appendices E, F and G. Reproductions of the constitutional provisions are contained in Appendix H.

STATEMENT OF THE CASE

On March 8, 1989, Petitioner was indicted for manufacturing in excess of one kilogram of a substance containing methamphetamine in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(A) (Count 1); and for possession in excess of one kilogram of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(A) (Count 2). (App. B) The acts for which he was indicted occurred on February 4, 1989. (App. B)

Petitioner was convicted on both counts on May 10, 1989, (App. C) and sentenced on August 23, 1989. (App. D) The punishment was based on § 841(b)(1)(A) (West Supp. 1990) and included (1) 120 months

imprisonment on counts 1 and 2 to run concurrently; (2) 5 years of supervised release on each of counts 1 and 2 to run concurrently, commencing upon Petitioner's release from prison; and (3) a $100 special assessment. (App. D)

The penalty provisions of § 841(b)(1)(A) concerning methamphetamine did not become effective law until March 28, 1989, 52 days after Petitioner committed the acts for which he was convicted. (App. G) Prior to that date, § 841(b)(1)(A) contained no penalty provisions regarding methamphetamine (App. F) Instead, the penalty provisions for methamphetamine were contained in § 841(b)(1)(D). (App. F) The penalty provisions in § 841(b)(1)(D) limited imprisonment to not more than 60 months.

REASONS FOR GRANTING THE WRIT

I. The Statute Under Which Defendant Was Convicted and Sentenced Constitutes an Ex Post Facto Law.

Petitioner was indicted, convicted and sentenced pursuant to an ex post facto law. The acts for which Petitioner was convicted occurred on February 4, 1989. (App. B) Petitioner was arrested that same day and indicted on March 8, 1989. (App. B)

The indictment and subsequent Judgment against Petitioner were pursuant to 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) for manufacture in excess of 1 kilogram of methamphetamine and possession with intent to distribute methamphetamine. (App. D) Applying § 841 (b)(1)(A) as it existed at the time of the Judgment, the district court sentenced Petitioner to the statutory

minimum of 10 years. (App. D and G) At the time Petitioner was arrested and indicted, however, § 841(b)(1)(A) did not include any penalties for the acts for which Petitioner was convicted and sentenced. (App. F) The penalty provisions of § 841(b)(1)(A) concerning methamphetamine were not effective until March 28, 1989. (App. G)

The ex post facto prohibition of the United States Constitution forbids punishment for an act which was not punishable at the time it was committed or imposes more severe punishment than that assigned by law when the act to be punished occurred. *Weaver v. Graham*, 450 U.S. 24, 30 (1981); U.S. Const. art. I, § 10 [1]. The prohibition includes any law increasing the potential punishment of an individual if it becomes effective after the culpable act was committed but prior to the time of sentencing. *Collins v. Youngblood*, 497 U.S.____ (1990).[1]

In *Lindsey v. Washington*, 301 U.S. 397 (1937), the Court observed that an increase in the possible penalty is an ex post facto law regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier. See also, *Dobbert v. Florida*, 432

1. The statutory imposition of additional punishment to that prescribed when a criminal act was committed has been held an ex post facto law prohibited by the U. S. Constitution. *Calder v. Bull*, 3 U.S. 386 (1796); *Cummings v. Missouri*, 71 U.S. 277 (1867); *Gut! v. State*, 76 U.S. 35; *Burgess v. Salmon*, 97 U.S. 381 (1878); *In Re Medley*, 134 U.S. 160 (1890); *Duncan v. Missouri*, 152 U.S. 377 (1894); *Mallet v. North Carolina*, 81 U.S. 589 (1901); *Malloy v. South Carolina*, 237 U.S. 180 (1915); *Beazell v. Ohio*, 269 U.S. 167 (1925); *Lindsey v. Washington*, 301 U.S. 397 (1937); *Dobbert v. Florida*, 432 U.S. 282 (1977); *Weaver v. Graham*, 450 U.S. 24 (1981).

U.S. 282 at 299 (1977). The Court held that "the Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." *Lindsey v. Washington*, 301 U.S. at 401.

Petitioner's conviction and sentencing is unconstitutional since he was indicted, convicted and punished under a statute with a penalty provision which was nonexistent at the time he committed the culpable act.

II. Petitioner's Fifth Amendment and Eighth Amendment Rights Were Violated by Being Punished in Excess of the Penalties Authorized by Congress

Petitioner's Fifth Amendment rights to due process and Eighth Amendment rights were violated because he was sentenced to 10 years imprisonment pursuant to a statute devoid of any punishment provision for the acts committed by Petitioner. Petitioner was convicted and sentenced pursuant to § 841(b)(1)(A) for manufacture and possession of methamphetamine. (App. D) At the time Petitioner committed the acts for which he was convicted, § 841(b)(1)(A) contained no penalty provisions for offenses of § 841(a)(1) concerning methamphetamine. (App. E and F)

Petitioner has a protected liberty interest under the Fifth Amendment against excessive punishment; he may be deprived of his liberty only to the extent authorized by statute. *Burge v. Butler*, 867 F.2d 247 (5th Cir. 1989); *Wasko v. Vasquez*, 820 F.2d 1090 (9th Cir. 1987). "Federal courts may Constitutionally impose only such punishment as Congress has seen fit to authorize."

Whalen v. United States, 445 U.S. 684, 689 (1980). In this instance, Congress failed to authorize punishment pursuant to § 841(b)(1)(A) for a violation of § 841 (a)(1) involving methtamphetamine. (App. G)

At the time Petitioner committed the acts, § 841(b) (1)(D) provided that a violation of § 841(a)(1) involving methamphetamine imposed a *maximum* imprisonment of five years; five years less than the imprisonment assessed to Petitioner. (App. E and F) Petitioner's conviction and sentencing, however, were not pursuant to § 841(b)(1)(D). (App. D)

Accordingly, Petitioner's sentence is unconstitutional and should be overturned. Alternatively, Petitioner's sentence is excessive and should be reduced so as not to exceed five years.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER, ANTONIO DIAZ

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-2916

Summary Calendar

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ANTONIO DIAZ, Defendant-Appellant.
Appeal from the United States District Court for the Southern District of Texas

(CR-H-89-90-01

(October 18, 1990)

Before CLARK, Chief Judge, GEE and DUHE', Circuit Judges.

PER CURIAM:[1]

I.

Antonio Diaz appeals from his conviction and sentence by the district court for manufacturing and possession with intent to distribute in excess of one kilogram of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). We affirm.

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1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Antonio Diaz is a resident of California. Prior to his arrest in Texas by the United States Drug Enforcement Agency (DEA) for the charges which are the subject of this appeal, he was arrested and charged in California with conspiracy to manufacture methtamphetamine in violation of California law. Diaz was released on bond and his indictment held in abeyance pending his completion of an agreement to cooperate with California authorities. He was expected to work as a confidential informant to enable California authorities to apprehend known local manufacturers of methamphetamine. Diaz was to make controlled purchases of the finished product from six individuals identified in the agreement. Diaz's agreement with the California authorities did not mention whether he was permitted to leave California, but it did not extend to persons outside of California. It did not allow Diaz to set up another lab or to supply controlled substances or precursor chemicals to anyone. The agreement stated Diaz understood that he was "not privileged to break any laws during the course of [his] association with the department;" that he was "not to handle any drugs at any time unless specifically authorized to do so by the California Health and Safety Code;" and that he was "to keep in constant contact with this agency while assisting [it]."

Ephedrine is a precursor chemical used in the manufacture of methamphetamine. It is a controlled substance in California, but not in Texas. Diaz alleged at trial that he journeyed from California to Texas to purchase 25 kilos of ephedrine for one of the six targets listed in the agreement, who gave him $4,500 to make the purchase. He asserted his belief that he was acting in furtherance of his agreement with California authorities, be-

cause supplying ephedrine would enable him to purchase the manufactured methamphetamine. He never communicated with his official contact before leaving California, although he stated he called a telephone number given to him many times, which went unanswered.

In Houston, Diaz met with Ron Fernandez, the owner of Scientific Chemical Laboratory Equipment Company. Diaz alleged that Fernandez informed him $4,500 was not enough for 25 kilos of ephedrine, but he would accept it if Diaz would teach Bill Mundy and Alton Lewis how to manufacture methamphetamine using the ephedrine process. The Government put on evidence that Diaz agreed to teach them the method in exchange for a price reduction. In any event, Diaz agreed to a purchase of ephedrine involving his instruction of the ephedrine process to manufacture methamphetamine. Mundy and Lewis, however, were undercover agents of the DEA.

Diaz disassembled a laboratory he operated in Crosby, Texas, and reassembled it in a hotel room in Houston. Diaz gave the agents the recipe for the chemical synthesis. He also manufactured a batch of methamphetamine in their presence to demonstrate certain complex steps. No sooner was the process complete than he was arrested while in possession of and operating the methamphetamine lab. Subsequent chemical analysis confirmed the existence of methamphetamine. The agents seized the equivalent of 3,826 grams of methamphetamine.

Diaz alleged at trial—as he does on appeal here—that he believed he was acting in good faith to complete his agreement with California authorities, and that his actions were protected by a defense of reasonable reliance on public authority. His sole intention, he argues,

was to purchase ephedrine to give to a target of the agreement. The trial judge instructed the jury on the defense of public authority, which it rejected when convicting Diaz of manufacture and possession with intent to distribute in excess of one kilogram of methtamphetamine. Diaz was given the mandatory minimum sentence of 120 months imprisonment, 5 years of supervised release, and an aggregate $100 special assessment.

III.

Diaz raises several related issues concerning the instructions given pursuant to his public authority defense. In the alternative, he challenges the length of the sentence imposed.

A. Public Authority

Diaz argues that his conviction must be reversed because the trial judge failed to define "public authority" and failed to properly instruct on "objectively reasonable reliance" in his instructions. He also argues that the Government presented insufficient evidence to overcome this defense. These arguments are patently without merit.

Diaz confuses the action for which he has been convicted with the actions which he believed to be authorized. Regardless of whether his purchase of ephedrine furthered his agreement with California authorities, he was not convicted for that purchase, but for his subsequent manufacture and possession of methamphetamine. While ephedrine may not be a controlled substance in Texas, his manufacture of methamphetamine clearly violated federal law. This violation in turn placed his actions

beyond the express terms of his agreement, which stated he was not privileged to break any laws in its completion. Also, Diaz acknowledged that importing the ephedrine into California as he planned would in itself constitute a violation of California law. He had been given no authority to import this drug. The face of the agreement demonstrates that he was only to make controlled purchases of methamphetamine from identified targets with funds provided by the California authorities. He was not authorized to import precursor chemicals or to manufacture the methamphetamine himself. Viewing this evidence in the light most favorable to the verdict, a rational trier of fact could have found the essential elements of his crime beyond a reasonable doubt. *United States v. Landry*, 903 F.2d 334, 338 (5th Cir. 1990). *See also United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd*, 462 U.S. 356 (1983). A jury could resolve Diaz's self-serving testimony that he believed he was authorized by California authorities to commit these violations against him on the basis that the Government's overwhelming evidence established that no such authorization was ever expressly given or implied.

As to the instruction itself, we accord broad discretion to the district court when formulating its instructions to the jury, so long as they fairly and adequately cover the issues presented in the case. *United States v. Natel*, 812 F.2d 937, 942 (5th Cir. 1987). Even when a defense is raised factually, a defendant is not entitled to an instruction in the language of his own choosing so long as the instructions as a whole address the issue adequately and with substantially correct statements of the law. *Id.* at 943. Comparing the instructions requested with that actually given, it is clear that the entirety of

Diaz's requested instruction is conveyed verbatim, plus an expansion given by the court.[2] While Diaz now argues that the instruction given allowed the jury to speculate as to what constitutes "public authority" and "objectively reasonable reliance," he neither offered his own definitions nor objected to their omission. Review is thus limited to a determination of plain error. *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1350-51 (5th Cir. 1988). See Fed. R. Crim. P. 52(b). Based on the instructions given, we find no error, much less plain error.

Diaz also argues that the district court failed to instruct

---

2. Diaz requested the following instruction:

> You have heard evidence that the defendant acted in a belief based upon the exercise of public authority on behalf of a law enforcement agency at the time of the alleged offense.
>
> Before you could find the defendant guilty, you must find beyond a reasonable doubt that the defendant was not acting under actual or believed exercise of public authority on behalf of a law enforcement agency. If you are not satisfied that the government has proved beyond a reasonable doubt that the defendant was not acting under actual or believed exercise of public authority on behelf (sic) of a law enforcement agency, then you must find the defendant not guilty.

The instruction actually given to the jury was as follows:

> You have heard evidence that the defendant acted in a belief based upon the exercise of public authority on behalf of a law enforcement agency at the time of the alleged offenses.
>
> Before you could find the defendant guilty, you must find beyond a reasonable doubt that the defendant was not acting under actual or believed exercise of the public authority on behalf of a law enforcement agency. *A believed exercise of public authority must be reasonable in light of the circumstances of the case.*
>
> If you are not satisfied that the Government has proven beyond a reasonable doubt that the defendant was not acting under actual or believed exercise of public authority on behalf of a law enforcement agency, then you must find the defendant not guilty. *If on the other hand you find from the evidence that the defendant's belief was unreasonable and that he was not acting under such a belief beyond a reasonable doubt, you may find the defendant guilty.*

The material in italics shows the trial court's augmentation of Diaz's requested instruction, which was accepted by the court in its entirety.

the jury on the issue of mistake. Diaz argues here that he mistakenly believed he acted pursuant to public authority, and that he should have received an instruction on this defense. The record does not reflect a request by Diaz for any instruction on mistake, nor did he object to its omission. However, the jury was charged with the Government's burden to prove that the defendant knowingly, unlawfully and willfully performed the acts for which he was convicted. "Knowingly" was defined as "voluntarily and intentionally and not because of mistake or accident or other innocent reason." The jury was also told that the violation had to be thus committed "to insure that no one would be convicted for an act done because of mistake or accident or other innocent reason." These instructions conveyed to the jury the requisite criminal intent necessary to convict, and that no conviction was permitted on the basis of Diaz's mistake as to his authority. Further, it is undisputed that Diaz was given no authorization to manufacture or possess with intent to distribute the methamphetamine for which he stands convicted. It is abundantly clear that California authorities could not authorize Diaz to make such violations of federal law in Texas. No plain error has been demonstrated.

B. Sentencing Considerations

Diaz makes two challenges to the sentence imposed upon him. First, he argues that the court based the sentence on an improper classification of the substance he manufactured, which he alleges to be L-methamphetamine and not simply methamphetamine. Second, he claims that the Sentencing Guidelines violate due process by not allowing credit for substantial assistance to the Government.

1. *Classification of the manufactured chemical*

Diaz argues that the district court based its sentence on a classification of the manufactured drug as methamphetamine, rather than L-methamphetamine, which is treated more leniently under the Guidelines. *See U.S.S.G.* § 2D1.1. However, at sentencing Diaz only asserted that the base level of his offense should be established according to the usuable drug quantity rather than the total weight of the seized mixture of methamphetamine oil. He raised no objection to the court concerning the substance's classification. Issues raised for the first time on appeal are not reviewable unless they involve purely legal questions and failure to consider them would result in manifest injustice. *United States v. Garcia-Pillado,* 898 F.2d 36, 39 (5ht Cir. 1990). The issue of the chemical content of the drug seized is purely one of fact. Because he never challenged the classification, the district court made no finding beyond the fact that this substance was "methamphetamine." While the government must prove every element of the offense charged, it need not prove that a term of ordinary meaning has no other possible meaning, unless the defendant raises the possibility that another meaning was intended.

Furthermore, while L-methamphetamine may be treated more leniently under the Guidelines, the quantity here manufactured ensured imposition of a mandatory minimum sentence of ten years imprisonment. *See* 21 U.S.C. § 841(b)(1)(A)(vii) ("100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers"). The Guidelines clearly state that a statutory mandatory minimum sentence controls any lesser-determined guideline range. U.S.S.G. § 5G1.1(b). Absent some other guide-

line consideration, the district court could not assess a lesser sentence than the the 120 months imposed, even based upon the classification for which Diaz argues. Diaz's attempt to recast this improper classification as a violation of due process, if error, would be harmless. No classification error could affect the sentence actually imposed.

2. *Due Process*

Diaz argues that he was denied due process by the Government's refusal to file a motion regarding his substantial assistance pursuant to U.S.S.G. § 5K1.1. Specifically, he claims that the Government refused to allow him to offer any substantial assistance, thereby depriving him of any opportunity that the district court might depart, pursuant to 18 U.S.C. § 3553(e), downwards from the statutory minimum.

An accused enjoys no due process right to present mitigating factors in general prior to sentencing. *United States v. Woolford*, 896 F.2d 99, 101-02 (5th Cir. 1990). There is no constitutional right to have the benefit of the "substantial assistance" provision. Thus, no grounds exist to challenge Congress' manner of enacting it. *United States v. Musser*, 856 F.2d 1484, 1487 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 1145 (1989). In *United States v. White*, 869 F.2d 822 (5th Cir.), *cert. denied*, 109 S.Ct. 3172 (1989), we stated that, while the substantial assistance provision of section 5K1.1 hinges on a motion by the Government, it "obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance." *Id.* at 829.

Diaz enjoyed no right to voluntarily assist the Government to avail himself of the possibility of a sentencing departure. He does not allege here what, if any, assistance he actually gave. Our prior decision in *White* allowed the district court to consider this evidence on motion by the defendent. The record does not indicate that Diaz made any such showing; therefore, there could be no error by the district court in refusing to depart from the mandatory minimum sentence required.

IV.

The judgment appealed from is

AFFIRMED.

APPENDIX B

(Filed March 8, 1989)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-89-90

UNITED STATES OF AMERICA

v.

ANTONIO DIAZ

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about February 4, 1989, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, ANTONIO DIAZ, defendant herein, did knowingly and unlawfully manufacture in excess of one kilogram of a substance containing the Schedule II controlled substance Methamphetamine.
(Violation: Title 21, United States Code, Sections 841 (a)(1) and 841(b)(1)(A)).

COUNT TWO

On or about February 4, 1989, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, ANTONIO DIAZ, defendant herein, did knowingly and unlawfully possess with the intent to

distribute in excess of one kilogram of a substance containing the Schedule II controlled substance Methamphetamine.

(Violation: Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(A)).

A TRUE BILL

/s/ WILLIAM D. DAWSON
Wiiliam D. Dawson
Foreman of the Grand Jury

Henry K. Oncken
United States Attorney
By: /s/ THOMAS I. MEEHAN, JR.
Thomas I. Meehan, Jr.
Assistant United States Attorney

APPENDIX C

(Filed May 10, 1989)

UNITED STATES OF AMERICA

v.

ANTONIO DIAZ

CASE NO. H-89-90

JURY NOTE NO. 3

COUNT ONE—GUILTY

COUNT TWO—GUILTY

/s/ RUSSELL HILL
Foreperson

APPENDIX D

(Filed October 3, 1989)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

Case Number H-89-00090-01

UNITED STATES OF AMERICA

v.

ANTONIO DIAZ

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Defendant's Attorney, Allen S. Percely.

The Defendant was found guilty on counts 1 and 2 of the indictment: after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses: Count 1, 21:841(a)(1) and 841(b)(1)(A)—Manufacture in excess of 1 kilogram of methamphetamine, a controlled substance. Count 2, 21:841(a)(1) and 841(b)(1)(A)—Possession with intent to distribute methamphetamine.

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. United States Attorney's Office, Financial Litigation Unit, P. O. Box 61129, Houston, Texas 77208.

August 23, 1989
Date of Imposition of Sentence

/s/ MARK CONSTANTINO
United States District Judge
Name & Title of Judicial Officer

September 21, 1989
Date

Defendant's Soc. Sec. Number.
546-33-2776

Defendant's mailing address:
83148 Beechwood Avenue
Indio, California 92201

Defendant's residence address:
83148 Beechwood Avenue
Indio, California 92201

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of One Hundred Twenty (120) Months on Counts 1 and 2 to run concurrently to each other.

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS on each Counts 1 and 2 to run concurrent to each other.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant is prohibited from possessing any firearm or other dangerous weapons.

APPENDIX E

PART D—OFFENSES AND PENALTIES

§ 841. *Prohibited acts A*

(a) Unlawful acts

Except as authorized by this subchapted, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

APPENDIX F

PART D—OFFENSES AND PENALTIES

§ 841. *Prohibited acts A*

[See main edition for text of (a)]

(b) Penalties

Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substance referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance

containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of Nphenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing containing a detectable amount of N-phenyl-N-[1-(2-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; or

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both.

Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 100 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provisions of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,-

000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

APPENDIX G

PART D—OFFENSES AND PENALTIES

§ 841 *Prohibited acts A*

[*See main volume for text of (a)*]

(b) Penalties

Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substance[1] referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4 piperidnyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become

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1. Subsection designation was struck out by Pub. L. 98-473 and is editorially supplied.

final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 405, 405A, or 405B after two or more prior convictions for a felony drug offense have become final, such person shall be out release and fined in accordance with the preceeding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this title or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marijuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marijuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

HISTORICAL AND STATUTORY NOTES

1988. *Amendment.....Subsec.* (b)(1)(A)(vi). Pub.L. 100-690, § 6470(g)(1), struck "or" at the end of cl. (vi).

Subsec. (b)(1)(A)(vii) Pub.L. 100-690, §§6470 (g)(2), 6479(2), inserted "or" at the end of cl. (vii) and substituted "containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight" for "containing a detectable amount of marihuana".

Subsec. (b)(1)(A)(viii). Pub.L. 100-690, § 6470 (g)(3), added cl. (viii).

Effective Date of 1988 Amendment. Amendment by section 6055 of Pub. L. 100-690 effective 120 days after Nov. 18, 1988, see section 6061 of Pub. L. 100-690, set out as a note under section 802 of this title.

APPENDIX H

U.S. CONSTITUTION,
Art. I, § 10[1]

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. CONSTITUTION,
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION,
Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Supreme Court, U.S.
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(2)

No. 90-1234

In the Supreme Court of the United States

OCTOBER TERM, 1990

ANTONIO DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner was punished under a statute that was not in effect at the time he committed the offense for which he was sentenced.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not reported, but the judgment is noted at 917 F.2d 562 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1990. The petition for a writ of certiorari was filed on January 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted

on one count of manufacturing more than one kilogram of methamphetamine and one count of possessing more than one kilogram of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to ten years' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-10a.

Before the events giving rise to the charges in this case occurred, petitioner had been arrested and charged in California with conspiracy to manufacture methamphetamine in violation of California law. Petitioner agreed to work for California authorities as a confidential informant, making controlled purchases of methamphetamine from six individuals known to be local manufacturers. Without informing his law enforcement contact in California, however, petitioner traveled to Texas to purchase ephedrine, a precursor chemical used in the manufacture of methamphetamine. Ephedrine is a controlled substance in California but not in Texas. Petitioner claimed at trial that the ephedrine was purchased for one of the six California targets from whom he planned to purchase methamphetamine. Pet. App. 2a-3a.

In Houston, petitioner arranged for the purchase of 25 kilograms of ephedrine from Ron Fernandez, the owner of a chemical equipment company. As part of the transaction, petitioner promised Fernandez that he would teach two other people how to manufacture methamphetamine using the ephedrine process. The two people turned out to be undercover agents of the Drug Enforcement Administration. Pet. App. 3a.

Petitioner disassembled a laboratory he operated in Crosby, Texas, and reassembled it in a hotel room in Houston. Petitioner gave the undercover agents instructions for the chemical synthesis of methamphetamine, and he manufactured a batch of methamphetamine in their

presence in order to demonstrate certain complex steps in the process. Once the process was complete, the agents arrested petitioner and seized more than 3,000 grams of methamphetamine. Pet. App. 3a.

Petitioner claimed at trial that he was acting in furtherance of his agreement with the California authorities, and he asserted a defense of reasonable reliance on public authority. The district court instructed the jury on the defense of public authority, but the jury rejected that defense and convicted petitioner on both counts charged. Pet. App. 3a-4a.

ARGUMENT

Petitioner contends (Pet. 3-6) that his sentence was imposed in violation of the Ex Post Facto Clause of the Constitution because he was punished under a penalty provision that was not yet in effect at the time he committed the charged offenses.

First, we note that petitioner failed to raise this claim in either the district court or the court of appeals. This Court customarily does not consider issues that were not raised in the courts below. *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).[1]

Second, petitioner is incorrect in his claim that the penalty provision under which he was sentenced had not taken effect at the time he committed his offenses. Petitioner was sentenced under 21 U.S.C. 841(b)(1)(A)(viii) (see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g)(3), 102 Stat. 4378, and Pet. App. 22a-25a), which provides for

[1] If petitioner had been sentenced under a provision not yet in effect at the time of his crimes, the proper course would be to file a motion under 28 U.S.C. 2255 in the district court claiming that his sentence was illegal.

a mandatory minimum of ten years' imprisonment for an offense involving more than 100 grams of methamphetamine. He argues that this provision, which superseded the previous penalty of a maximum of 20 years' imprisonment (21 U.S.C. 841(b)(1)(C) (Supp. V 1987)), did not take effect until March 28, 1989, nearly two months after the date of his offense, February 4, 1989. Petitioner cites a provision from the amending legislation, the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VI, § 6061, 102 Stat., 4320, which provides as follows:

> Except as otherwise provided in this subtitle, this subtitle shall take effect 120 days after the enactment of this Act.

As the plain language of this provision indicates, it applies to the subtitle in which it is found, that is, Subtitle A of Title VI of the Act. The part of the statute that amends the penalty for the possession and manufacture of methamphetamine is found in Subtitle N of Title VI at Section 6470(g). There is no reference to a special effective date for that subtitle or for Title VI as a whole. Nor is there an effective date specified for the Anti-Drug Abuse Act as a whole, although the Act provides effective dates for some discrete sections. See, *e.g.*, Pub. L. No. 100-690, §§ 1012, 2404(d), 2600, 5160, 5301(h), 6105(c), 7079(b), 7296(a), 7303(d), 7366(b), 7513(c).

As this Court has recently stated, in the absence of a clear directive from Congress to the contrary a law takes effect on the date of its enactment. *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 846 (1991). Since the Act contains no effective date for Section 6470(g), that section must be deemed to have taken effect upon enactment—that is, on November 18, 1988, almost three months before petitioner committed his offenses. 111 S. Ct. at 846-847. The district court

therefore properly sentenced petitioner under the amended penalty provisions of Section 841.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
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Attorney

APRIL 1991

[2] Petitioner's claim that his sentence also violated his Fifth and Eighth Amendment rights to due process and freedom from cruel and unusual punishment likewise fails, as it is based on his assertion that the penalty provision that the sentencing court relied on was not yet in effect.

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ANTHONY DIAZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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No. 90-1234

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Anthony Diaz, files this Reply to Respondent's Brief in Opposition.

I

ARGUMENT

Respondent misstates Petitioner's claim and addresses the wrong issue. Unlike Respondent's statement on page 3 of its Brief, Petitioner does not "claim that the penalty provision under which he was sentenced had not taken effect at the time he committed his offenses." Instead, Petitioner claims, *inter alia*, that the statute under which he was convicted was not in effect at the time he committed the acts for which he was convicted. Specifically, 21 U.S.C. 841(b)(A)(viii) was not effective at the time Petitioner committed the allegedly illegal acts. Thus, Petitioner's claim addresses the effective date of the offense for which he was convicted, not the penalty provision.

II

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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